

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

IRA IVES COULSTON,

Plaintiff and Appellant,

v.

AZTEC BOWLING, INC.,

Defendant and Respondent.

D043239

(Super. Ct. No. GIC792572)

APPEAL from a judgment of the Superior Court of San Diego County, Sheridan E. Reed, Judge. Affirmed.

Plaintiff Ira Ives Coulston appeals a judgment after jury trial favoring defendant Aztec Bowling, Inc. (Aztec) on his complaint for battery, negligence, intentional infliction of emotional distress and premises liability. Coulston contends the court erred by granting Aztec's motion for nonsuit on the ground that Aztec was not in a joint venture with its agent Bill Young, the individual who personally battered Coulston. Coulston also attacks as unsupported by substantial evidence the jury's finding that Young was

acting outside the scope of his agency at the time he battered Coulston. We determine Coulston has not established any judicial error and, accordingly, affirm the judgment.

## I

### INTRODUCTION

#### A

##### *Factual Background*

For purposes of determining the propriety of the granting of Aztec's motion for nonsuit, we state the facts and reasonable inferences in the light favoring Coulston. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 (*Nally*); *Golceff v. Sugarman* (1950) 36 Cal.2d 152, 153 (*Golceff*); *Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541-1542 (*Saunders*); *Marvin v. Adams* (1990) 224 Cal.App.3d 956, 960 (*Marvin*).)

Aztec owned and operated a San Diego bowling alley (the Alley) where at times it hosted concerts, parties and events to attract patrons with different demographic characteristics. At the request of occasional Alley patron Young, Aztec's manager Mike Velasco orally agreed to permit Young to promote and stage a concert at the Alley during the afternoon and evening of July 22, 2001, by bands recruited and compensated by Young. Because the Alley was going out of business and scheduled to close permanently on July 26, 2001, the July 22 event was to be called the Final Frame ("Final Frame"). Velasco agreed that at the Final Frame, Young could promote and sell the Daredevil line of clothing Young marketed. As such, Young's interest in the Final Frame was purely business.

Aztec's interest in the Final Frame was also purely commercial, namely, to attract customers and make money. At the Final Frame, Aztec would sell bowling-related merchandise, food and drinks, including alcohol. Further, to help Young attract patrons to the Final Frame, Velasco agreed to discount the costs of bowling during the event.

Although Young was responsible for promoting the Final Frame, Velasco required that the promotional poster include the name Aztec Bowling Alley and "21-and-Up." Velasco also retained the final authority to veto any salacious poster. After the posters were approved by Velasco, some were posted at the Alley. Further, although Young was responsible for ensuring the bands complied with Aztec's rules of conduct, Velasco retained final authority over the permissible conduct at the Final Frame, including the behavior of the bands and Young.

Velasco permitted Young to charge a cover fee for entry to the Final Frame and set up a table at the Alley's entrance. Because alcohol would be sold, Velasco required that Young check identifications at the door to ensure all patrons were at least age 21. Velasco gave Young a hand stamp for use at the door.

About 8:00 a.m. on the day of the Final Frame, Young arrived at the Alley. Young helped Velasco set up the event by building stages, moving sound equipment and carrying beer inside. After setting up the event, Young left the Alley to eat and returned about noon.

During the Final Frame, Young charged his cover fee at the Alley's door while wearing a shirt sporting the poster design and the words "Final Frame" and "Aztec Bowl." During the event, Young also gave away clothing from his Daredevil line.

Further, during the event, Young worked with Aztec's staff "[t]o make sure that everything ran smoothly," namely, that the bands were timely, that the only people inside the Alley were those who belonged there, and that the alcohol on hand was replenished. During the event, Young drank beer obtained from Velasco.

About 3:00 p.m. on the day of the Final Frame, plaintiff Coulston arrived at the Alley with his friend Rachel Marnik. At the front door, Coulston paid their cover charges, their hands were stamped, and they went inside. After obtaining drinks at the bar inside the Alley, Marnik and the eventually intoxicated Coulston began "running around," "playing" with one another, "tickling each other," and "being silly." An Aztec employee asked them to "calm down."

Later, an Aztec employee told Coulston he must leave the Alley because the owner did not want him there. After his ejection from the Alley, Coulston stayed outside for a while but then returned inside. Approximately 35 to 40 minutes later, upon seeing Coulston again "being loud and running around," Velasco grabbed Coulston, escorted him to the door, pushed him out and said "don't come back." On the last occasion he escorted Coulston outside, Velasco said he would call police if Coulston returned.

Upon later observing Coulston inside the Alley, Velasco asked Young for help in ejecting Coulston. When Young asked what was wrong, Velasco said Coulston had been ejected but continued to sneak inside. Velasco grabbed Young by the arm and pointed him in Coulston's direction.

Young approached Coulston and asked him to leave. As Coulston was "goofing around a little," Young said: "All right. Let's just go." Young then picked up Coulston,

put Coulston over his shoulder and carried Coulson out of the Alley and into the parking lot. Once outside, Young threw Coulston to the ground, picked him up and hurled him against the Alley's wall. As Coulston slid down the wall, Young again picked him up and threw him against the wall. Several females, including Marnik, screamed at Young to stop. As Marnik moved between Young and Coulson, she pleaded with Young to stop. Young said, "Get out of my way or I'll kill you, too."

With Coulston's blood on his shirt, Young returned inside the Alley. Upon seeing Young and without any investigation, Velasco told him, "Man, you better get out of here." Young apparently left.

Coulston was bloodied, spitting up blood, taken by ambulance to a hospital, treated for a partially collapsed lung and admitted to the hospital for three days. Eventually, Young was convicted for attacking Coulston.

## B

### *Procedural Background*

In July 2002 Coulston filed this lawsuit against Aztec and Young for battery, negligence, intentional infliction of emotional distress and premises liability.<sup>1</sup> Coulston's complaint alleged: Young was acting in the course of his employment of providing "security" at the Alley at the time he battered Coulston; hence, Young was Aztec's agent; and Aztec was thus vicariously liable for Coulston's torts. Although Coulston's complaint

---

<sup>1</sup> Young is not a party to this appeal.

also alleged in passing that Aztec and Young were partners of each other, the pleading did not allege the relationship between Aztec and Young was a joint venture.

In July 2003 Coulston moved in limine for a finding that as a matter of law the Final Frame was a joint venture and Young was Aztec's ostensible agent even though Coulston's complaint did not allege those issues. On the day before trial call, Coulston sought leave to amend his complaint to allege the relationship between Aztec and Young was a joint venture. The court removed Coulston's motions in limine from calendar without prejudice. Further, the court stated it would allow amendment of the complaint if the evidence were sufficient to support a finding that a joint venture existed between Aztec and Young.

At the close of Coulston's case-in-chief, Aztec moved for nonsuit on the issues of joint venture and ostensible agency. The court denied nonsuit with respect to ostensible agency because the record contained evidence indicating Velasco asked Young to remove Coulston from the Alley. However, the court deferred its consideration of the issue whether a joint venture existed between Aztec and Young until after the parties had completed their evidentiary presentations and it decided Coulston's motion to amend his complaint to conform to proof. Thus, the court permitted Coulston to present evidence to the jury on the issues of joint venture and ostensible agency.

After the close of evidence, the court granted Aztec's motion for nonsuit with respect to the nonexistence of a joint venture because Young had no control over Aztec's activities. The court also denied Coulston's request to amend his complaint to include the

words "joint venture" because, as not indicating Young had any control over Aztec, the evidence was insufficient to support a finding that a joint venture existed.

The jury rendered a special verdict finding Young was Aztec's agent at the time he battered Coulston. However, the jury also found that at the time Young committed the battery on Coulston, Young was not acting within the scope of such agency. Further, the jury found Aztec negligently managed the premises but such negligence was not a cause of Coulston's injury.

In August 2003 after the jury rendered its verdict, Coulston filed a motion for judgment in his favor with respect to the issues of agency and joint venture. Coulston also filed a motion for directed verdict on the joint venture issue. Aztec opposed Coulston's motions on the ground there was no statutory support for a directed verdict once the jury had rendered its verdict.

In September 2003 the court entered judgment on the jury verdict. Later that month, the court denied as untimely Coulston's motions for judgment and for directed verdict. However, in accord with the parties' stipulation, the court construed Coulston's motion for directed verdict as a motion for judgment notwithstanding the verdict (JNOV) or a motion for new trial. Ultimately, the court denied Coulston's motions for JNOV and new trial.

On this appeal, Coulston seeks reversal of the judgment and entry of a new judgment in his favor or remand for a new trial. Coulston contends the court should have found as a matter of law that as Young's joint venturer in the Final Frame, Aztec was vicariously liable for Young's battery tort against Coulston committed in furtherance of

the joint venture. Coulston also contends the court should have found as a matter of law that as the principal of its agent Young, Aztec was vicariously liable for the battery tort committed by Young in the scope of his agency. Specifically, Coulston contends the jury's finding that Young was not acting in the scope of his agency at the time he battered Coulston lacked substantial evidentiary support. We conclude the court properly entered judgment favoring Aztec.

## II

### DISCUSSION

#### A

##### *The Trial Court Properly Granted Nonsuit Favoring Aztec on the Issue of Joint Venture*

Coulston contends the court reversibly erred by granting Aztec's motion for nonsuit on the issue whether the Final Frame was a joint venture between Aztec and Young. However, we determine that because the evidence was insufficient to support a finding that a joint venture existed between Aztec and Young, the trial court properly granted Aztec's motion for nonsuit with respect to that issue.

#### 1

##### Standard of Review of Grant of Motion for Nonsuit

A motion for nonsuit must be denied "if there is . . . any substantial evidence, which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averments of the complaint." (*Golceff, supra*, 36 Cal.2d at pp. 152-153.) However, a "defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor."

(*Nally, supra*, 47 Cal.3d at p. 291.) "Since motions for nonsuit raise issues of law [citation], we review the rulings on those motions de novo . . . ." (*Saunders, supra*, 42 Cal.App.4th at pp. 1541-1542.) "In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citation.] We will not sustain the judgment "unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law."" (*Nally*, at p. 291; *Golceff*, at p. 153; *Saunders*, at pp. 1541-1542; *Marvin, supra*, 224 Cal.App.3d at p. 960.) We do not weigh the evidence or witness credibility. (*Nally*, at p. 291.)

## 2

### The Concept of Joint Venture

Coulston contends the court should have permitted the jury to determine whether Aztec was vicariously liable on a joint venture theory. Although "rarely invoked outside the automobile accident context," the joint venture (or joint enterprise) theory is well established and "recognized in this state as an exception to the general rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 (*Christensen*).) "Normally it is a matter for the jury to decide whether a joint adventure existed." (*Jones v. Reith* (1958) 166 Cal.App.2d 220, 225 (*Jones*).) However, "there must be some evidence which, if true, would establish a joint adventure under the law . . . ." (*Ibid.* [without such evidence it is error for the trial court to instruct the jury on joint venture].)

"A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit. [Citations.]' [Citation.] 'Like partners, joint venturers are fiduciaries with a duty of disclosure and liability to account for profits.'" (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 (*Weiner*).) "The distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve 'a continuing business for an indefinite or fixed period of time.' [Citation.] Yet a joint venture may be of longer duration and greater complexity than a partnership. From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Ibid.*)

"A joint venture exists when there is 'an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control.'" (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 863 (*Connor*).) Thus, the "elements necessary for [a joint venture's] creation are: (1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control.'" (580 *Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 15-16 (580 *Folsom*); accord *Ramirez v. Long Beach Unified School Dist.* (2002) 105 Cal.App.4th 182, 193 (*Ramirez*); *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, 91 (*Scottsdale*); *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 819 (*April*).) "A joint venture or partnership may be formed orally [citations], or 'assumed to have been organized from a reasonable deduction from the acts

and declarations of the parties.'" (*Weiner, supra*, 54 Cal.3d at pp. 482-483.) "'The existence of a joint venture depends upon the intention of the parties.'" (*580 Folsom*, at p. 16.)

"It is only where a person actually acts through another to accomplish his own ends that the law will or should impose such vicarious liability. Right of control over the other person is a test of the required relationship, but it is not itself the justification for imposing liability. Aside from such legal relationships as master and servant, principal and agent, etc., before the courts will find that the parties were joint adventurers there must be clear evidence of a community of interest in a common undertaking in which each participant has or exercises the right of equal or joint control and direction.

[Citations.] A joint venture is sort of a mutual agency . . . . [Citations.] It is not sufficient that the parties have certain plans in common, but the community of interest must be such that [each] is entitled to be heard in the control [of the enterprise].

[Citations.] Most of the cases indicate that the common interest must be of some business nature.'" (*Christensen, supra*, 54 Cal.3d at p. 893.)

### 3

### Analysis

Coulston contends evidence established the Final Frame was a joint venture as a matter of law by showing the event resulted from an oral agreement between Young and Aztec's Velasco, each side had a profit motive in the Final Frame's success, and each exercised some control over the Final Frame. However, the record did not contain evidence sufficient to support a finding that the relationship between Aztec and Young

with respect to the Final Frame constituted a joint venture. Even if we were to deem the evidence sufficient to demonstrate that Aztec and Young had a joint interest in the Final Frame (the first material element necessary for creation of a joint venture), the evidence was insufficient to establish that Aztec and Young had the right to joint control over the Final Frame (the third material element) or an understanding to share the Final Frame's profits (the second material element). (*Christensen, supra*, 54 Cal.3d at p. 893; *Connor, supra*, 69 Cal.2d at p. 863; *Ramirez, supra*, 105 Cal.App.4th at p. 193; *Scottsdale, supra*, 98 Cal.App.4th at p. 91; *580 Folsom, supra*, 223 Cal.App.3d at pp. 15-16; *April, supra*, 147 Cal.App.3d at p. 819; *Jones, supra*, 166 Cal.App.2d at p. 225.)

(a)

*Young Did Not Have the Right of Joint Control over the Final Frame*

In granting nonsuit favoring Aztec on the issue whether the relationship between Aztec and Young with respect to the Final Frame constituted a joint venture, the trial court addressed the matter of the right of Velasco and Young to "control, . . . direct and govern the conduct of each other." The court determined there was "no testimony" indicating that "Young had any control over anything other than the take at the door" or that "Young had any control over the conduct or activity of Mr. Velasco." Coulston's counsel replied: "Correct, he wouldn't need to have exact control over Mr. Velasco, he would need to have control over the defendant, Aztec Bowl, Inc., in some manner with respect to the joint undertaking, and he did, he had control of the door." The court eventually concluded there was no joint venture between Aztec and Young. Stating it was "satisfied" that for a joint venture "there has to be some right on the part of each to

control at least some of the conduct of each other," the court noted that although Velasco had the right to control Young's conduct during the Final Frame, there was no evidence sufficient to show that Young had any control over Velasco (Aztec).

Coulson contends the law requires only that a joint venturer have joint control over the joint venture itself, not over each other's employees; the joint venturers may agree to unequal control over the venture; and the evidence showed Young controlled a part of the Final Frame, namely, the door to the Alley. However, evidence that Young merely had a limited right to admit Final Frame patrons into the Alley was by itself insufficient to show that Aztec and Young agreed that Young was "'entitled to be heard in the control'" of the Final Frame for purposes of establishing the third material element necessary for creation of a joint venture, namely, the right of joint control over the enterprise. (*Christensen, supra*, 54 Cal.3d at p. 893; *Ramirez, supra*, 105 Cal.App.4th at p. 193; *Scottsdale, supra*, 98 Cal.App.4th at p. 92; *580 Folsom, supra*, 223 Cal.App.3d at pp. 15-16; *Goldberg v. Paramount Oil Co.* (1956) 143 Cal.App.2d 215, 220 (*Goldberg*); *Stilwell v. Trutanich* (1960) 178 Cal.App.2d 614, 618 (*Stilwell*).)

A "right of mutual control over the subject matter of the enterprise or over the property engaged therein [is] essential to a joint venture." (*Goldberg, supra*, 143 Cal.App.2d at p. 220; *Parker v. Trefry* (1943) 58 Cal.App.2d 69, 75.) It has been stated that to establish a joint venture, there must be "an 'equal right' or a 'right in some measure' to direct and control the conduct of each other and of the enterprise." (*Stilwell, supra*, 178 Cal.App.2d at p. 618.) However, although "it has been said that joint control of the undertaking and equal power to direct the enterprise is an essential element of a joint

venture [citations] this is not to say that there cannot be a joint venture where the parties have unequal control of operations. The requirement of authority and control has been construed to mean that while in the absence of special agreement one joint venturer cannot bind the others, 'they may by agreement grant authority to one or more of their number which would not be implied from the relationship alone.'" (*Id.* at p. 619.)

Coulston has not identified any evidence sufficient to support a finding that for purposes of creating a joint venture, Aztec agreed to grant Young any authority to bind Aztec with respect to the operations of the Final Frame. (*Stilwell, supra*, 178 Cal.App.2d at p. 619.) Further, although the "relationship of joint venturers is that of a mutual agency" (*Leming v. Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 350 (*Leming*); *Christensen, supra*, 54 Cal.3d at p. 893), Coulston has not pointed to any evidence demonstrating the existence of any mutual agency between Aztec and Young. As the jury ultimately found, Young was Aztec's agent. However, absent any showing that Aztec was Young's agent for a purpose related to the Final Frame, there was insufficient evidence to support a finding that mutual agency existed. (*Leming*, at p. 350.) Instead, undisputed evidence showed the only control exercised by Young with respect to the Final Frame was the power to charge a cover fee at the door for admittance to the Alley, an ability granted by Aztec to all promoters interested in presenting a show at the Alley.

Undisputed evidence also indicated that although Aztec's manager Velasco granted Young permission to charge a cover fee for admittance to the Final Frame, Aztec had plenary power over the Alley while the event was underway, including control over the admittance of individuals (limited to age 21 or older), the bands' conduct, and the

security for the event.<sup>2</sup> Further, Aztec retained the right to allow access to the Alley, without payment, to any patron who came only to bowl rather than for the Final Frame itself. Thus, despite the delegated authority of Aztec's agent Young to grant or deny admission to the Final Frame, Young did not have joint mutual control with Aztec over the enterprise or the Alley. (*Goldberg, supra*, 143 Cal.App.2d at p. 220.) Further, Coulston has not identified any evidence sufficient to support a finding that Aztec authorized Young to exercise any control over activities conducted by Aztec or its employees during the Final Frame. (*Ramirez, supra*, 105 Cal.App.4th at p. 193 [school district was not a joint venturer with a camp where its student drowned because, in part, there were "no facts demonstrating the [s]chool [d]istrict had any right to control the [c]amp, its employees, or its counselors"].)

In sum, this record did not contain "clear evidence of a community of interest in a common undertaking in which each participant has or exercises the right of equal or joint control and direction." (*Christensen, supra*, 54 Cal.3d at p. 893.) Based on the lack of evidence sufficient to support a finding that Aztec and Young had a right of joint control over the Final Frame (the third material element necessary for creation of a joint venture), the trial court properly granted Aztec's motion for nonsuit on the issue of the nonexistence of a joint venture between Aztec and Young. (*Ibid.*; *580 Folsom, supra*, 223 Cal.App.3d at pp. 15-16; *Jones, supra*, 166 Cal.App.2d at p. 225.)

---

<sup>2</sup> Velasco and Young had discussed the need for security at the Final Frame, but decided none was required.

In any event, even if the record were deemed to contain evidence sufficient to demonstrate Aztec and Young had the right to joint control over the Final Frame, there was insufficient evidence to support a finding that Aztec and Young had an understanding to share profits and losses from the Final Frame (the second material element necessary for creation of a joint venture). (*Connor, supra*, 69 Cal.2d at p. 863; *Ramirez, supra*, 105 Cal.App.4th at p. 193; *Scottsdale, supra*, 98 Cal.App.4th at p. 92; *580 Folsom, supra*, 223 Cal.App.3d at pp. 15-16.) Considering the absence of sufficient evidence to establish that element, the nonsuit was proper.

(b)

*Aztec and Young Had No Agreement to Share Profits and Losses from the Final Frame*

Coulston contends the evidence showed Aztec and Young agreed to share the profits and losses from the Final Frame. However, the evidence relied upon by Coulston indicated that although the profits of Aztec and Young were dependent on the overall success of the Final Frame, neither Aztec nor Young had an interest in the proceeds received by the other. (*Connor, supra*, 69 Cal.2d at p. 863; *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 177-178 (*Krantz*); *580 Folsom, supra*, 223 Cal.App.3d at p. 19.)<sup>3</sup> Such evidence showed that instead of agreeing to pool the proceeds and share the

---

<sup>3</sup> In *Connor, supra*, 69 Cal.2d 850, the Supreme Court stated that although the profits of the alleged joint venturers in that case "were dependent on the overall success of the development, neither was to share in the profits or the losses that the other might realize or suffer. Although each received substantial payments as seller, lender, or borrower, neither had an interest in the payments received by the other. Under these circumstances, no joint venture existed." (*Id.* at p. 863, fn. omitted; cited in *Krantz, supra*, 89 Cal.App.4th at p. 177; *580 Folsom, supra*, 223 Cal.App.3d at p. 19.)

profits from the Final Frame, Aztec simply kept the money it received and Young kept the funds he received. In an agreement to divide profits, the word "profits" means "'the excess of receipts over expenditures.'" (*Howard v. D. W. Hobson Co.* (1918) 38 Cal.App. 445, 451 (*Howard*).) As such, the profits accruing to the participants in an alleged joint venture necessarily must be joint and not several. (See *Dority v. Driesel* (Or.App. 1985) 706 P.2d 995, 998-999 (*Dority*).)<sup>4</sup>

Here, undisputed evidence indicated any profits accruing to Aztec and Young from the Final Frame would be several, not joint. (*Howard, supra*, 38 Cal.App. at p. 451; *Dority, supra*, 706 P.2d at pp. 998-999.) Specifically, Aztec permitted Young to keep all money he collected at the Alley's door; Young ultimately gave the money he collected to the bands for expenses; although Young had offered Velasco a percentage of the revenue from the door, Velasco declined because he believed Aztec would make enough money from the sale of alcohol; Aztec also permitted Young to keep all proceeds from the sale

---

<sup>4</sup> In *Dority, supra*, 706 P.2d 995, in reversing the trial court's finding that a joint venture existed, the appellate court noted that the profits anticipated by the participants to the alleged joint venture "were not to be shared jointly. Rather, each was hoping to enjoy a distinct form of gain independent of that of the other. Indeed, either one might profit from the [enterprise] while the other failed to receive any benefit at all. The fact that parties act in concert to achieve some economic objective, while relative to the inquiry, is not enough to create a joint venture." (*Id.* at p. 998.) The appellate court also noted: "'Not every joint operation which results in benefit for the parties constitutes a sharing of profits which characterizes joint adventure. The profits, in whatever form earned, must be the joint property of the parties before division.'" (*Ibid.*) Further, the appellate court observed: "'The chief characteristic of a joint adventure is a joint and not a several profit. Profits which are severally earned, the parties merely having dealt with the same subject matter, but not for and on behalf of each other, do not meet this requirement[] of the existence of a joint adventure.' [¶] Concomitantly, any potential loss from the [alleged joint venture] would also be unique to each party." (*Ibid.*)

of his displayed clothing line at the Final Frame; and during the Final Frame, Aztec sold bowling-related merchandise, food and drinks, including alcohol, and kept all proceeds from those items.

In sum, the undisputed evidence indicated Young was not entitled to a share of the money Aztec collected for alcohol, bowling or food; and Aztec was not entitled to a share of the money Young collected at the door or on the sale of his clothing lines. Thus, although Aztec and Young were free to decide to share profits and losses equally or unequally based on their unequal contributions (*Krantz, supra*, 89 Cal.App.4th at p. 178 ["the mode of participation in the fruits of the undertaking may be left to the agreement of parties"]), they did not do so. Instead, at most, they merely allowed each side to retain the proceeds it received. As such, absent any showing that either side "was entitled to share in any profits" or losses that the other side might receive from the Final Frame, this evidentiary record was insufficient to support a finding that Aztec and Young had an understanding to share the profits and losses from the event. (*580 Folsom, supra*, 223 Cal.App.3d at p. 19; *Howard, supra*, 38 Cal.App. at p. 451.) Hence, on this evidentiary record, Coulston failed to establish the second material element necessary for creation of a joint venture, namely, an understanding to share the profits and losses of the Final Frame. (*Connor, supra*, 69 Cal.2d at p. 863; *Ramirez, supra*, 105 Cal.App.4th at p. 193;

*Scottsdale, supra*, 98 Cal.App.4th at p. 92; *Krantz*, at p. 177; *580 Folsom*, at pp. 15-16, 19; *Jones, supra*, 166 Cal.App.2d at p. 225.)<sup>5</sup>

Accordingly, because the trial court correctly granted Aztec's motion for nonsuit on the issue of the nonexistence of a joint venture between Aztec and Young, the portion of the judgment favoring Aztec with respect to the joint venture issue must not be disturbed.

## B

### *The Jury Reasonably Found Young's Battery of Coulston Was Beyond the Scope of Young's Agency with Aztec*

The jury found that at the time Young committed the battery on Coulston, Young was not acting within the scope of his agency with Aztec. Attacking that finding, Coulston contends there was no evidence sufficient to show Young's battery tort was beyond the scope of his agency. Coulston also contends that even if Young's battery of Coulston were properly deemed to have occurred outside the scope of Young's agency, the record contained evidence sufficient to establish as a matter of law that Aztec, through its manager Velasco, ratified Young's wrongful conduct and was thus liable for the battery. However, as we shall explain, Coulston has not demonstrated any reversible

---

<sup>5</sup> Although the trial court granted nonsuit on the lack of evidence to support a finding of a right of joint control, Aztec's nonsuit motion in the trial court also raised the issue of the lack of evidence to support a finding of an understanding to share the profits and losses of the Final Frame. Since the absence of sufficient evidence on the profit sharing issue was specified in Aztec's nonsuit motion, we may properly consider such issue on this appeal. (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 426, pp. 486-487.)

error with respect to the jury's finding Young was not acting in the scope of his agency when he battered Coulston.

1

## Young's Agency and Its Scope

(a)

### *The Law of Vicarious Liability and Respondeat Superior*

"The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296 (*Lisa M.*)).<sup>6</sup> "Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Id.* at pp. 296-297.) ". . . California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests." (*Id.* at p. 297.) However, although the employee "need not have intended to further the employer's interests, the

---

<sup>6</sup> "Civil Code section 2338, which has been termed a codification of the respondeat superior doctrine [citation], is not limited to employer and employee but speaks more broadly of agent and principal; it makes the principal liable for negligent and 'wrongful' acts committed by the agent 'in and as a part of the transaction of such [agency] business.'" (*Lisa M., supra*, 12 Cal.4th at p. 296, fn. 2.)

employer will not be held liable for an assault or other intentional tort that did not have a causal nexus to the employee's work." (*Ibid.*)<sup>7</sup>

"The nexus required for respondeat superior liability — that the tort be engendered by or arise from the work — is to be distinguished from 'but for' causation. That the employment brought tortfeasor and victim together in time and place is not enough." (*Lisa M.*, *supra*, 12 Cal.4th at p. 298.) The California Supreme Court has "used varied language to describe the nature of the required additional link (which, in theory, is the same for intentional and negligent torts): the incident leading to injury must be an 'outgrowth' of the employment [citation]; the risk of tortious injury must be "'inherent in the working environment'" [citation] or "'typical of or broadly incidental to the enterprise [the employer] has undertaken.'" (*Ibid.*) ". . . California courts have also asked whether the tort was, in a general way, *foreseeable* from the employee's duties." (*Id.* at p. 299, italics added.)<sup>8</sup> "Respondeat superior liability should apply only to the types of injuries "'as a practical matter are *sure* to occur in the conduct of the employer's enterprise.'" [Citation.] The employment, in other words, must be such as predictably to create the

---

<sup>7</sup> Although Coulston contends there was no evidence that Young's wrongful act was motivated by anything other than Young's desire to fulfill his role as Aztec's agent to eject Coulston from the Alley, elsewhere in his opening brief Coulston cites *Lisa M.*, *supra*, 12 Cal.4th at pages 297-298, for his assertion that California law has "rejected" a focus on "the agent's intention to serve the ends of the principal" in favor of focusing on "whether the tort was engendered by or arose from the work."

<sup>8</sup> Hence, without merit is Coulston's contention that the foreseeability of Young's battery tort was immaterial.

risk employees will commit intentional torts of the type for which liability is sought."

(*Ibid.*, italics added.)<sup>9</sup>

(b)

*Standard of Review*

For purposes of determining the propriety of the jury's finding that Young was acting outside the scope of his agency at the time he battered Coulston, we must state the facts and reasonable inferences most favorably to Aztec as the party prevailing after jury trial. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 (*Mix*); *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633 (*Kuhn*).) Coulston has the burden on appeal to show the record contained no substantial evidence to support the challenged jury finding, a burden not met by Coulston. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-874.)

---

<sup>9</sup> Young was not "formally employed" by Aztec but instead was its "nonemployee agent" or "ostensible agent." (*Lisa M.*, *supra*, 12 Cal.4th at p. 296, fn. 2) Hence, *Lisa M.* is factually distinguishable as involving a formal employer-employee relationship. However, in analyzing the issue whether Young was acting in the scope of his agency when he battered Coulston, we apply the principles of respondeat superior discussed in the employment context in *Lisa M.*, principles presumably at least as advantageous to third party plaintiff Coulston as the standards applied in situations involving only a nonemployee agent or an ostensible agent. (*Ibid.*)

(c)

*Analysis*

"Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when "the facts are undisputed and no conflicting inferences are possible."" (*Lisa M.*, *supra*, 12 Cal.4th at p. 299; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213 (*Mary M.*); *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968.) Contrary to Coulston's contention, the record contained conflicting evidence on the issue whether Young was acting beyond the scope of his agency with Aztec at the time he battered Coulston. Hence, on this record containing disputed evidence bearing on the Young's relationship with Aztec, the scope of Young's agency was a factual issue for the jury. As such, the jury could reasonably disbelieve or otherwise reject any evidence favoring Coulston. Considering the evidence and reasonable inferences most favorably to Aztec, we conclude substantial evidence supported the jury's finding that at the time Young committed the battery on Coulston, Young was not acting within the scope of his agency with Aztec. (*Mix, supra*, 14 Cal.3d at p. 614; *Kuhn, supra*, 22 Cal.App.4th at pp. 1622-1623.)

Young's responsibilities related to the Final Frame were to recruit the bands, prepare the advertising poster, set up the stage, charge a cover fee at the Alley's door, and admit only persons who were at least age 21. Aztec's manager Velasco was solely responsible for security at the Final Frame and the only person authorized to eject a patron. Velasco did not ask Young to perform any type of security function for Aztec.

Further, Velasco did not delegate the responsibility for security or ejection to Young or anyone else.

If other persons or employees working for Aztec during the Final Frame believed there was an unruly patron they could not handle, the standard procedure was to find Velasco immediately so he could take care of the matter. If Velasco determined he could not handle the situation, the standard practice was to call 911 and request help by the police. Velasco believed he could deal with Coulston without needing to summon police.

On the final occasion that Velasco escorted Coulston out the Alley's door during the Final Frame, Velasco said he would call police if Coulston returned. After that occasion, Velasco did not see Coulston in the Alley. At no time on the day of the Final Frame did Velasco ever ask Young to take Coulston out of the Alley or delegate that responsibility to Young or anyone else. Before Young carried Coulston out of the Alley, Velasco had no discussion whatsoever with Young about Coulston. Further, Velasco did not see Young carry Coulston out of the Alley.

Eventually, Velasco heard that Young had carried Coulston outside. About 8:30 or 9:00 p.m., when the last band was starting near the end of the Final Frame, Young entered the Alley from the parking lot. Blood was on Young's nose and shirt. Velasco approached Young and asked what had happened. Young told Velasco: "Mike, the kid that you threw out here three times, jumped up and punched me in the nose, and I picked him up and threw him to the ground."<sup>10</sup>

---

<sup>10</sup> Velasco did not suggest that the bloodied Young leave the Alley.

Based on that substantial evidence, the jury could reasonably find: The incident leading to Coulston's injury was not an "outgrowth" of Young's agency with Aztec; and the risk of tortious injury was not "inherent" in the environment of the Alley during the Final Frame or "typical of or broadly incidental" to the enterprise undertaken by Aztec. (*Lisa M.*, *supra*, 12 Cal.4th at p. 298.) Further, the jurors could reasonably find that the kind of tortious injury suffered by Coulston was not among "the types of injuries that "as a practical matter are sure to occur in the conduct of [Aztec's] enterprise,"" or that the nature of the responsibilities involved in Young's agency were such as "predictably to create the risk" that agents would "commit intentional torts of the type for which" Coulston was seeking liability. (*Id.* at p. 299.) Contrary to Coulston's contention, substantial evidence showed that Young's duties related to the Final Frame did not include providing security services. Hence, since Young's battery of Coulston did not occur during Young's performance of his assigned tasks, his ejection of Coulston from the Alley was not necessarily an outgrowth of Young's agency. Similarly, to the extent Aztec authorized Young to deny persons entry to the Alley, such authorization did not necessarily encompass ejection or otherwise causally engender tortious battery. Further, it was within the jury's province to (1) accept Velasco's testimony that he did not request or direct Young to remove Coulston from the Alley and (2) reject Young's testimony to the contrary. (*Mary M.*, *supra*, 54 Cal.3d at p. 213.) The jurors could also reasonably reject Young's testimony to the extent it suggested his agency included maintaining order in the Alley.

In sum, after weighing the evidence and witness credibility, the jury reasonably found that although Young was Aztec's agent, he was not acting within the scope of that agency when he battered Coulston. Coulston's contentions to the contrary are without merit. In essence, Coulston contends the record contained evidence sufficient to show that Young's assertedly agency-motivated ejection of Coulston from the Alley constituted the first event in the sequence of events leading to Young's battery of Coulston. (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 141 ["the fundamental issue is whether the wrongful act was committed '*in the course of*' a series of acts of the agent which were authorized by the principal"]; *Fields v. Sanders* (1947) 29 Cal.2d 834, 839.) However, Coulston improperly seeks reweighing on appeal of conflicting evidence presented to the jury.

Accordingly, the jury's finding that Young was not acting within the scope of his agency with Aztec at the time he committed the battery on Coulston must not be disturbed.

## 2

### Ratification

A principal may be liable when it ratifies its agent's originally unauthorized tort. (*Shultz Steel Co. v. Hartford Accident & Indemnity Co.* (1986) 187 Cal.App.3d 513, 523.) Seeking entry of a new judgment in his favor, Coulston contends that even if Young's battery of Coulston was not within the scope of Young's agency with Aztec, the evidence established as a matter of law that Aztec, through its manager Velasco, ratified Young's tortious conduct by not investigating the incident or censuring Young and was thus liable

to Coulston for the battery. However, Coulston essentially asks us to resolve a factual issue never presented to the jury, a request we decline. Although the trial court denied Coulston's request for a jury instruction on ratification, Coulston has not attacked that ruling on this appeal. Under these circumstances, Coulston has failed to present a cognizable appellate issue with respect to the matter of ratification. (Cf. *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501.)

### III

#### DISPOSITION

The judgment is affirmed.

---

IRION, J.

WE CONCUR:

---

NARES, Acting P. J.

---

McINTYRE, J.